FILED
APR 29 1994
OFFICE OF THE CLERK

No. 93-892

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NTA GRAPHICS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Of Counsel:
STEPHEN A. BOKAT
MONA C. ZEIBERG
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

GLEN D. NAGER
(Counsel of Record)
COLLEEN COVELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939
Attorneys for the Chamber of Commerce of the United States of America

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether an administrative agency such as the National Labor Relations Board may depart from prior adjudicative decisions reflecting one of its established policies without providing a reasoned explanation of its legal basis or reasons for doing so.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICUS	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. THE BOARD MUST PROVIDE A REASONED EXPLANATION FOR ITS DECISIONS AND ANY DEPARTURES FROM PRIOR DECISIONS OR POLICY	9
II. THE BOARD HERE DID NOT PROVIDE A REASONED EXPLANATION FOR ITS DEPARTURE FROM PRIOR DECISIONS AND POLICY	14
III. THE POST-HOC RATIONALIZATIONS OF THE COURT OF APPEALS AND THE SOLICITOR GENERAL CANNOT AND DO NOT SUBSTITUTE FOR THE REASONED EXPLANATION THAT THE BOARD WAS REQUIRED BUT FAILED TO PROVIDE	19
CONCLUSION	22

TABLE OF AUTHORITIES

Cases	Page
A.B. Hirschfeld Press, Inc., 96 N.L.R.B. 1068 (1951)	20
ABF Freight System, Inc. v. NLRB, 114 S.Ct. 835 (1994)	11
American Trucking Ass'n v. Atchison, T. & S. F. Ry., 387 U.S. 397 (1967)	12
Atchison, T. & S. F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800 (1973)	11, 13, 14, 15, 17
Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986)	11, 12
Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962)	10, 12, 13, 20, 21
CBS v. FCC, 454 F.2d 1018 (D.C. Cir. 1971)	8
Continental Web Press, Inc. v. NLRB, 742 F.2d 1087 (7th Cir. 1984)	*passim*
Continental Web Press, Inc., 262 N.L.R.B. 1395 (1982)	4, 16
Earl Litho Printing Co., Inc., 116 N.L.R.B. 1538 (1956)	20
FCC v. RCA Communications, Inc., 346 U.S. 86 (1953)	10
Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 923 (1971)	13, 15
International Union (UAW) v. NLRB, 459 F.2d 1329 (D.C. Cir. 1972)	12, 18, 21
Local 777, Democratic Union Organizing Committee v. NLRB, 603 F.2d 862 (D.C. Cir. 1978)	18
May Department Stores Co. v. NLRB, 326 U.S. 376 (1945)	11
Moore Business Forms, Inc., 216 N.L.R.B. 833 (1975)	4, 17
Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)	12, 13, 18, 19
NLRB v. Action Automotive, Inc., 469 U.S. 490 (1985)	10
NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267 (1974)	8, 12, 13

TABLE OF AUTHORITIES—Continued

Page

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990) 12
NLRB v. International Union of Operating Eng'rs, 460 F.2d 589 (D.C. Cir. 1972) 12, 13, 21
NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965) ..... *passim*
NLRB v. Meyer Label Co., 597 F.2d 18 (2d Cir. 1979) 15
NLRB v. Weingarten, Inc., 420 U.S. 251 (1975) 10
Packard Motor Co. v. NLRB, 330 U.S. 485 (1947) 9, 10, 11
Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) 11
Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479 (9th Cir.), *cert. denied*, 113 S.Ct. 598 (1992) 10
SEC v. Chenery Corp., 332 U.S. 194 (1947) 19
Secretary of Agriculture v. United States, 347 U.S. 645 (1954) 13, 14, 17
South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs, 425 U.S. 800 (1976) (per curiam) 8, 9

Statutes

National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988) 2
29 U.S.C. § 159(b) 9
29 U.S.C. § 160(e) 11
5 U.S.C. § 706(2)(E)13 (1988) 11

Miscellaneous

Louis L. Jaffe, *Judicial Control of Administrative Action*, 588 (1965) 8, 10, 14, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-892

NTA GRAPHICS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS [1]

The Chamber of Commerce of the United States of America ("Chamber"), a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade, and professional organizations in the United States. It represents the interests of over 220,000 corporations, partnerships, and proprietorships, as well as state and local chambers of commerce and trade associations. The Chamber regularly represents the interests of its member-employers in important employment matters before the courts, the

---

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

United States Congress, the Executive Branch, and independent regulatory agencies of the Federal government.

The Chamber has a significant interest in the question presented in this case. The Chamber's members regularly appear before administrative agencies and are concerned with receiving rational and explicable decisions from those agencies. Moreover, a large number of the Chamber's members are subject to the National Labor Relations Act ("Act"), 29 U.S.C. §§ 151-169 (1988), and frequently appear before the National Labor Relations Board ("Board") in a variety of proceedings. The Board's ability to reverse or depart from policy and precedent without notice or serious explanation undermines the business operations of the Chamber's members by exposing them to uncertain and ever-changing labor and employment policies.

STATEMENT OF THE CASE

This case presents a significant example of how the enormous power reposed in modern administrative agencies can be abused. Specifically at issue is whether the Board may depart without serious or understandable explanation from its long-established policy of including at least pre-press and press department employees in the lithographic printing industry in the same bargaining unit. More generally at issue is whether and how courts should police the raw, unexplained exercise of administrative power in circumstances that involve an acknowledged departure from prior administrative decisions. The more general question is pertinent not only to businesses subject to regulation under the Act, but also to businesses that are subject to regulation under any statutory scheme that confers regulatory authority on an administrative agency (*e.g.*, the Federal Communications Commission, the Federal Trade Commission, the Environmental Protection Agency). The background of the proceedings is as follows:

1. Petitioner, NTA Graphics, Inc. ("Petitioner") is a single-product, commercial lithographic printer that pro-

duces newspaper advertising inserts for grocery stores. Pet. App. A19. Like essentially all commercial lithographic printers, Petitioner produces these advertising inserts through a production process that is divided among five departments: a composition department, a pre-press department, a press department, a shipping and receiving department, and a maintenance department. *Id.* at A19-A20.

In the production process, the composition department receives copy from a customer and consults with the pre-press department on color and other printing configurations. Pet. App. A19-A20. The composition department then gives the press department instructions on paper size and quantities to be produced. *Id.* at A20. The shipping and receiving department ensures that Petitioner's newspaper advertising inserts are timely delivered to customers. *Id.* And, finally, the maintenance department cares for the physical facilities of the production operation. *Id.*

There is apparently little day-to-day contact among the employees of the five departments. Pet. App. A21-A22. Each department has a separate direct supervisor, though there is common management. *Id.* at A22. The skills of the employees in the departments also vary to some extent, and different degrees of prior experience and training apparently are required to perform the jobs in the various departments. *Id.* at A23. In addition, the rates of pay, working hours and uniforms for the employees in the departments apparently differ to some extent. *Id.* at A24-A25. Finally, there is apparently little transfer or interchange among the departments. *Id.* at A25-A26.

2. In 1987, the Graphic Communications International Union, Detroit/Toledo/Lansing Local 289, AFL-CIO-CLC ("Union"), filed a petition seeking to represent the employees in Petitioner's pre-press and press room departments. Pet. App. A7. Petitioner opposed the petition on the ground that in its workplace the appropriate bargain-

ing unit should consist of all production and maintenance employees. *Id.* at A19. After a hearing, the Union changed course and argued in a post-hearing brief that the bargaining unit should be limited to only the press department employees. *Id.*

The Board's Regional Director agreed with the Union's altered position. Pet. App. A15. The Regional Director acknowledged that pre-press employees in the commercial lithographic industry are traditionally included in the same bargaining unit as press department employees. *Id.* at A25; *see also id.* at A27. But the Regional Director found the facts of the instant case to "closely parallel those in *Continental Web Press, Inc.*, 262 N.L.R.B. 1395 (1982), in which the Board found that the press room department employees shared a distinct community of interests." Pet. App. A26. And the Regional Director distinguished a case involving a traditional lithographic industry bargaining unit that included both pre-press and press department employees, *Moore Business Forms, Inc.*, 216 N.L.R.B. 833 (1975), on the ground that, in that case, pre-press and press department employees worked under common supervision, frequently visited the other employees' working areas, and performed tasks in the other employees' working areas. Pet. App. A27.

3. In a split decision, the Board summarily denied Petitioner's request for review of the Regional Director's decision, stating that it agreed "with the Regional Director that the facts here warrant a departure from the traditional unit of lithographic production employees as there is insufficient evidence of cohesiveness between the preparatory employees and pressroom employees to warrant a broader unit." Pet. App. A13. Chairman Stephens dissented, stating that in his view the Board should "determine the applicability of *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984)," the federal court of appeals' decision which had denied enforcement of the Board decision that the Regional Director relied upon in reaching his decision. *Id.* at A14.

4. The Board then held an election and certified the Union as the collective bargaining representative of the press department employees. Pet. App. A7-A8. Petitioner, however, refused to bargain with the Union. *Id.* at A8. Accordingly, the Union filed unfair labor practice charges and the General Counsel issued a complaint alleging that Petitioner had violated Sections 8(a)(5) and (1) of the Act. *Id.* at A5. The Board thereafter granted the General Counsel's motion for summary judgment and ordered Petitioner to bargain with the Union. *Id.* at A6.

5. On appeal, the Sixth Circuit enforced the Board's order. Pet. App. A1-A4. The court found that "[t]he record supports a finding of differences in working conditions sufficient to support a conclusion that the pressmen at the Company enjoy a distinct community of interests." *Id.* at A3. In support of this conclusion, the court noted that the press room is physically separate from the other departments; that the press room employees have different skills than the employees in other departments; that there is not any significant interchange or transfer among employees in the various departments; and that the press room employees have separate supervision, may work a different schedule, and are paid on a different scale. *Id.* at A3-A4.

SUMMARY OF ARGUMENT

I. This case is about an abuse of the considerable discretionary powers that administrative agencies such as the Board possess. As is true of all administrative agencies that are responsible for administering statutory schemes, the Board has considerable discretion in enforcing the Act, especially in determining appropriate bargaining units. But this Court has made it plain that the Board's discretion, including its discretion in unit determinations, is not unbounded. On the contrary, the Court has made it clear that important principles of administrative law bound that discretion and thereby prevent the Board from abusing its administrative powers.

First, like all administrative agencies, the Board must disclose the basis for its orders. Second, the basis for the Board's orders must not be arbitrary or capricious; there must be a rational connection between the facts found and the choice made by the Board. And, finally, when the Board departs from prior decisions, it must acknowledge the change in course and supply a reasoned basis for its departure from its prior decisions.

With respect to this latter requirement, it is well-established that, while the Board may adopt new rules and orders in response to changed circumstances, the Board may not adopt rules and orders that, like a restricted railroad ticket, are good for one time and one place only. Like all administrative agencies, the Board must act in a reasoned and principled way. Moreover, it is also well-established that, once a settled course of behavior has been established, there is a presumption that the Board will not depart from it. If the Board choses to do so, it is obligated to supply a reasoned analysis for the change beyond that which may be required when it acted or did not act in the first instance. And, to the extent that the Board seeks to rely on factual differences to distinguish prior cases, some legislative policy must make those factual differences relevant and material. These requirements prevent the arbitrary exercise of the Board's enormous administrative powers.

II. The Board's decision here does not conform to these administrative law requirements. As it has tried to do numerous other times in different areas of labor policy, the Board departed from its established policy without providing any justification for its action. The Board appears to have acknowledged that it was departing from prior decisions in approving a bargaining unit of only press department employees in the lithographic printing industry. But the Board did not provide an acceptable explanation for this departure.

The Board's single statement that there is insufficient evidence of cohesiveness between Petitioner's pre-press

and press department employees is more a conclusion than an explanation. It does not explain *why* the requisite cohesiveness is missing. It does not explain *how* the interests of the pre-press department's employees will be protected. And it does not explain *what* difference in evidence of cohesiveness exists between the facts of this case and the facts of the many cases in which the Board has found that pre-press and press department employees of commercial lithographic industry employers should be included in the same bargaining unit.

Nor does the Regional Director's decision provide the necessary explanation. The Regional Director purported to justify the departure from prior policy by reference to a Board decision that the Regional Director failed to acknowledge had been repudiated by a distinguished court of appeals and that itself erroneously denies that such a prior policy ever existed. Moreover, while the Regional Director identified factual distinctions between this case and other cases that the Board has decided, he did not explain why these factual differences should lead to a different legal result—which is precisely the explanation that administrative law principles require an agency to give before it may depart from prior decisions. And, in all events, the factual differences the Regional Director identified range from the unconvincing to the trivial. Accordingly, they do not suffice to allow a departure from prior decisions of the Board.

III. The post-hoc rationalizations of the court of appeals and the Solicitor General cannot and do not substitute for the reasoned explanation that the Board was required but failed to give for its departure from prior decisions and policy. This Court has long held that neither appellate counsel nor appellate courts may supply a reasoned basis for an administrative agency's action that the agency has not itself given. And, in all events, both the court of appeals and the Solicitor General rely on the same factual differences that the Regional Director relied upon—factual differences that appear trivial and

that do not begin to explain why Petitioner's employees should be treated differently than the employees of other lithographic industry employers who have in the past come before the Board. To allow such trivial and unexplained distinctions to justify a departure from such a long-standing course of administrative decision would mean, contrary to all principles of administrative law, that administrative agencies such as the Board rule with no practical limits on their discretion at all. That is not and should not be the law.

ARGUMENT

Long ago, Professor Louis Jaffe poignantly observed that: "Discretion, however valuable, can be a facade for inadequate thinking, failure to face issues, hidden expediencies, or downright dishonesty. These vices multiply in large, overworked agencies where the power of decision may be fractionated and diffused." Louis L. Jaffe, *Judicial Control of Administrative Action* 588 (1965). These vices are at work in this case.

Under the Act, the Board has considerable discretion to determine appropriate bargaining units. *South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 805 (1976) (per curiam). However, long-established principles of administrative law provide that, in exercising this discretion, an administrative agency such as the Board must explain its decisions and, in particular, any departures from prior decisions and policies. *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 289 (1974); *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-44 (1965). The requirement that an agency such as the Board explain its decisions and, especially, any departures from prior decisions and policies is aimed at ensuring that the agency's discretion is fairly and rationally exercised and that prior policies and standards are not being ignored in a manner indifferent to the rule of law. *CBS v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971).

The court below enforced the Board's order in this case on the ground that the record was sufficient to support a finding that Petitioner's press room employees had a distinct community of interests. The court below made no effort, however, to require the Board to explain why in the past it had consistently required, on similar factual records, that at least pre-press department employees in the lithographic printing industry be included in the same unit with the press department employees. By failing to require such an explanation, the court below improperly approved an uncabined and unexplained exercise of an administrative agency's power—an exercise of power that important and long-established principles of administrative law are designed to constrain and control. This Court should not allow either the erroneous decision of the court below or this arbitrary exercise of the Board's power to stand.

I. THE BOARD MUST PROVIDE A REASONED EXPLANATION FOR ITS DECISIONS AND ANY DEPARTURES FROM PRIOR DECISIONS OR POLICY

As is true of all administrative agencies that are responsible for administering statutory schemes, the Board has considerable administrative discretion—especially insofar as it is responsible for selecting appropriate bargaining units. Section 9(b) of the Act expressly confers upon the Board the authority to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or a subdivision thereof." 29 U.S.C. § 159(b). This Court has thus said that "the selection of an appropriate unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed.'" *South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs*, 425 U.S. at 805 (quoting *Packard Motor Co. v. NLRB*, 330 U.S. 485, 491 (1947)). Indeed, the Court

has said that this deference is particularly appropriate in the context of bargaining unit determinations, since the Board's discretion there "reflect[s] Congress' recognition 'of the need for flexibility in shaping the [bargaining] unit to the particular case.'" *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985) (citation omitted).

But, like the discretion of other administrative agencies, the Board's considerable discretion is plainly bounded. *Accord, Packard Motor Co. v. NLRB*, 330 U.S. at 491-92; *see also FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953) ("Congress did not purport to transfer its legislative power to the unbounded discretion" of the agency). "The Administrative Procedure Act [("APA")] ensures that the massive federal bureaucracy remains tethered to those it governs," *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1483-84 (9th Cir.), *cert. denied*, 113 S. Ct. 598 (1992), and the APA applies with full force to the Board's decisions, including its unit determinations. *See Packard Motor Co. v. NLRB*, 330 U.S. at 491-92; *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. at 442-44. Thus, this Court has made it plain that "[r]eviewing courts are of course not 'to stand aside and rubber stamp' Board determinations that run contrary to the language or tenor of the Act," *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (citation omitted). Rather, as this Court has stated in an analogous context, the applicability of the Administrative Procedure Act confirms that Congress understood that "[e]xpert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'" *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (citation omitted); *see generally* L. Jaffe, *supra*, at 588.

First among the "strict and demanding" requirements that the APA imposes is the requirement that, like agen-

cies such as the FCC and FTC, the Board must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941). *Accord, NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. at 442-43. The Act expressly states that the Board's orders are enforceable only if they are supported by "substantial evidence." *See* 29 U.S.C. § 160(e); *see also* 5 U.S.C. § 706(2)(E) (1988). And this Court has repeatedly held that, pursuant to the requirements of the APA, the Board, like all other administrative agencies, "must set forth clearly the grounds on which it acted." *Atchison, T. & S. F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973). *See NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. at 443-44; *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 197. As the Court has stated, "Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision." *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 627 (1986).

Second but no less important among the "strict and demanding" requirements that the APA imposes to constrain properly the exercise of the Board's vast administrative power is the rule that the Board, like all other administrative agencies, may not act arbitrarily and capriciously. *ABF Freight System, Inc. v. NLRB*, 114 S.Ct. 835, 839 (1994); *Packard Co. v. NLRB*, 330 U.S. at 491; *May Department Stores Co. v. NLRB*, 326 U.S. 376, 380 (1945). "Agency deference has not come so far that we will uphold [administrative action] whenever it is possible to 'conceive a basis' for [it]." *Bowen v. American Hospital Ass'n*, 476 U.S. at 626. "[T]he mere fact that there is 'some rational basis within the knowledge and experience of the [regulators],' under which they 'might have concluded' that the regulation was necessary to discharge their statutorily authorized mission, will not suffice

to validate agency decision-making." *Id.* at 626-27 (citations omitted). Rather, as is true of other administrative agencies, the Board must state the reasons for its actions and those reasons must articulate a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. at 168; *NLRB v. International Union of Operating Eng'rs*, 460 F.2d 589, 604 (5th Cir. 1972). The Board's decision will be set aside if it has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 799 (1990) (Blackmun, J., dissenting); *International Union (UAW) v. NLRB*, 459 F.2d 1329, 1342-44 (D.C. Cir. 1972).

Third but again no less important among the "strict and demanding" requirements that the APA imposes to constrain the Board's vast administrative discretion is the rule that, when an administrative agency such as the Board departs from prior decisions or policy, it must acknowledge the change in course and supply a reasoned basis for its departure from the prior decisions or norm. *See NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. at 443; *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. at 289; *NLRB v. Curtin Matheson Scientific Co.*, 494 U.S. at 799-800 (Blackmun, J., dissenting). "Regulatory agencies do not establish rules of conduct to last forever," *American Trucking Ass'n v. Atchison, T. & S. F. Ry.* 387 U.S. 397, 416 (1967), and the Board like other administrative agencies "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.' " *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42 (cita-

tion omitted); *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. at 294. But "there may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case." *NLRB v. International Union of Operating Eng'rs*, 460 F.2d at 604 (footnote omitted).

On the contrary, a "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T. & S. F. Ry. v. Wichita Bd. of Trade*, 412 U.S. at 807-08. Thus, while the Board may depart from prior decisions and norms, like other administrative agencies, when it wants to do so, it must expressly acknowledge that "prior policies and standards are being deliberately changed, [and] not [being] casually ignored." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 923 (1971). And, like other administrative agencies in such circumstances, the Board "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency [acts or] does not act in the first instance." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42. *See NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. at 442-43.

In particular, in such circumstances, not only must the Board articulate a "rational connection between the facts found and the choice made," *Burlington Truck Lines, Inc. v. United States*, 371 U.S. at 168, but the Board must also explain "its departure from prior norms" and "spell[] out the legal basis of its decision." *Secretary of Agriculture v. United States*, 347 U.S. 645, 653 (1954); *NLRB v. International Union of Operating Eng'rs.*, 460 F.2d at 604. "The agency may flatly repudiate those [prior] norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate congressional policy. Or it may nar-

row the zone in which some rule will be applied, because it appears that a more discriminating invocation of the rule will best serve congressional policy. Or it may find that, although the rule in general serves useful purposes, peculiarities of the case before it suggest that the rule not be applied in that case." *Atchison, T. & S. F. Ry. v. Wichita Bd. of Trade*, 412 U.S. at 808. "Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." *Id.* And, of course, factual differences may be relied on to distinguish prior cases and norms "only when some legislative policy makes the differences relevant to determining the proper scope of the prior rule." *Id. Accord, Secretary of Agriculture v. United States*, 347 U.S. at 653-55. It is precisely because statutory standards are general and administrative discretion is almost necessarily so great that courts must "insist that the Board apply with reasonable consistency whatever standard it adopts to guide the exercise of its delegated power." *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1089 (7th Cir. 1984). *Accord*, L. Jaffe, *supra* at 587.

II. THE BOARD HERE DID NOT PROVIDE A REASONED EXPLANATION FOR ITS DEPARTURE FROM PRIOR DECISIONS AND POLICY

The Board's decision here cannot be sustained under these controlling administrative law standards. The Board appears to have acknowledged that it was departing from prior decisions and policy in approving a bargaining unit in the lithographic printing industry composed of only press department employees. *See* Pet. App. A13. But the Board did not provide an acceptable explanation of the basis for its departure.

The Board's explanation of its decision in this case consists of a single statement—to wit, that the Board agreed with the Regional Director that "the facts here

warrant a departure from the traditional unit of lithographic production employees as there is insufficient evidence of cohesiveness between the preparatory employees and press room employees to warrant a broader unit." Pet. App. A13. But this assertion is more a conclusion than an explanation. The Board did not explain *why* the evidence in the record failed to demonstrate the requisite cohesiveness; it just asserted that the cohesiveness between these employee groups is not sufficient. Moreover, the Board did not explain *how* the interests of the pre-press employees would be properly protected—an issue that the Board's congressional mandate requires the Board to consider and address. *See, e.g., Continental Web Press, Inc.*, 742 F.2d at 1091; *NLRB v. Meyer Label Co.*, 597 F.2d 18, 22 (2d Cir. 1979). And the Board did not explain *what* difference in evidence of cohesiveness exists between the facts of this case and the facts of the many cases in which the Board has found that pre-press and press department employees of lithographic industry employers should be included in the same bargaining unit. *See Continental Web Press, Inc. v. NLRB*, 742 F.2d at 1092-93 (reviewing Board decisions in this area).

Administrative law principles do "not require loquacity" on the part of an administrative agency such as the Board, especially where it is merely applying prior precedent. *Id.* at 1092. But, where an agency is departing from prior decisions or policy, controlling principles of administrative law require the agency to identify the factual differences that are of importance to it *and* to "explain *why* these factual differences should lead to a difference in legal result or even why, as an original matter, the facts here justified a unit limited to pressmen." *Id.* at 1092, 1094. *See also Atchison, T. & S. F. Ry. v. Wichita Bd. of Trade*, 412 U.S. at 808-09. The Board's conclusory statement here, however, does not do so. It thus "cross[es] the line from the tolerably terse to the intolerably mute." *Greater Boston Television Corp. v. FCC*, 444 F.2d at 852.

Nor can the necessary explanation for the departure from prior decisions and policy be derived from the Regional Director's decision, which the Board arguably adopted by reference. *See* Pet. App. A13. To be sure, the Regional Director's decision contains a somewhat more expansive discussion than does the Board's decision of the facts of this case and the Board's prior case law. *See id.* at A15-A28. But, like the Board's decision, the Regional Director's decision fails to explain why the factual differences between this case and those prior cases should lead to a difference in legal result.

At the outset, it is important to recognize that the Regional Director placed great reliance on the Board's decision in *Continental Web Press, Inc.*, 262 N.L.R.B. 1395 (1982), a case with facts that the Regional Director characterized as "closely parallel" to those at issue here. Pet. App. A26. In doing so, however, the Regional Director did not even so much as acknowledge that the Seventh Circuit refused to enforce the Board's order in that case—in part because it found that the facts of *Continental Web Press, Inc.* were legally indistinguishable from the facts in the many cases in which the Board had said that bargaining units in the lithographic printing industry should include both pre-press and press department employees. *See Continental Web Press, Inc. v. NLRB*, 742 F.2d at 1092-94. Nor did the Regional Director so much as acknowledge that, in *Continental Web Press, Inc. v. NLRB*, the Board *denied* that it was departing from its prior decisions and, indeed, approved a Regional Director decision that "had gone so far as to say that the Board has a long-established policy of recognizing pressman as a separate unit." *Id.* at 1093. It is arbitrary and capricious for the Board to rely on a Regional Director decision that purports to justify a change from prior policy by referring to a Board decision that has been repudiated by a distinguished court of appeals and that itself denies that such a prior policy ever existed.

Moreover, the Regional Director did not even attempt to explain the legal significance of the facts to which he pointed. The Regional Director made much of the fact that, as in *Continental Web Press, Inc.*, Petitioner's press room employees do not have much contact with employees of other departments, do not tend to transfer to other departments, have no significant interchange with other employees, have different shift times, and wear different uniforms. Pet. App. A26-A27. He also made much of the fact that, in contrast to the situation in *Moore Business Forms, Inc.*, 216 N.L.R.B. 833 (1975), Petitioner's press room employees work under a separate direct supervisor, do not interact much with pre-press room employees, and have little occasion to visit the pre-press room. Pet. App. A27. But, again, identifying factual differences between cases is not the same as explaining "*why* these factual differences should lead to a difference in legal result." *Continental Web Press, Inc. v. NLRB*, 742 F.2d at 1094. And it is the latter explanation that an administrative agency like the Board must give in order properly to depart from prior decisions and policy. *Accord, Secretary of Agriculture v. United States*, 347 U.S. at 652-54; *Atchison, T. & S. F. Ry. v. Wichita Bd. of Trade*, 412 U.S. at 808. Here, "by a course of adjudications extending over many years, the Board succeeded in developing a clear policy that seems applicable to this case; and to discard the policy without explanation would be arbitrary." *Continental Web Press, Inc. v. NLRB*, 742 F.2d at 1093.

Indeed, it is difficult to see how the factual differences to which the Regional Director pointed could be used properly to justify a departure from the Board's traditional policy of including pre-press employees in the lithographic printing industry in the same bargaining unit as press employees. As the Seventh Circuit explained in its decision in *Continental Web Press, Inc. v. NLRB*, 742 F.2d at 1094, "[t]he facts of this case apparently are the same as the facts of many other cases that the Board has

decided the opposite way," and the Board cannot properly treat similar situations differently. *See Local 777, Democratic Union Organizing Comm. v. NLRB*, 603 F.2d 862, 870 (D.C. Cir. 1978). Moreover, even to the extent that the facts of this case are arguably different than the facts of the other cases that the Board has decided, there does not appear to be any basis grounded in legislative policy—and certainly the Board has not articulated such a basis—for treating these factual differences as sufficiently significant to justify a different legal result; as the Seventh Circuit concluded, when viewed from the perspective of whether the pre-press and press room employees have a sufficiently distinct "community of interest" in wages, fringe benefits and working conditions, "all these differences seem small and unimportant," and some "seem[] utterly trivial." *Continental Web Press, Inc. v. NLRB*, 742 F.2d at 1091-92. Or, as another court of appeals said about the Board's reasons in another context, "the reasons advanced for ignoring the rule in this one case range from unconvincing to trivial." *International Union (UAW) v. NLRB*, 459 F.2d at 1341.

While the Board should be free to adopt any rational policy that it wants with respect to the appropriate bargaining unit(s) for pre-press and press room employees in the commercial lithographic printing industry, "[j]udicial supervision to ensure that agencies are 'faithful and not indifferent to the rule of law' is too vital for us to be satisfied with [such] a few illogical or hastily concocted rationalizations." *Id.* at 1341 (footnote omitted). On the contrary, if the Board's discretion is to be exercised consistent with traditional rules of administrative law, the Board must provide the "rational connection between the facts and judgment required to pass muster under the arbitrary-and-capricious standard." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 56. *See NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. at 442-43. The Board has not done so here.

III. THE POST-HOC RATIONALIZATIONS OF THE COURT OF APPEALS AND THE SOLICITOR GENERAL CANNOT AND DO NOT SUBSTITUTE FOR THE REASONED EXPLANATION THAT THE BOARD WAS REQUIRED BUT FAILED TO PROVIDE

Rather than evaluate whether the Board's purported explanation for its departure from prior precedent was adequate, the court below and the Solicitor General offer their own explanations for the bargaining unit that the Board has approved. But these post-hoc rationalizations cannot and do not substitute for the reasoned explanation that the Board was required but failed to provide for its departure from prior precedents and policy.

With respect to the decision of the court of appeals, it is clear that the court below did not require the Board to explain the basis for its departure from prior decisions and policy or, indeed, even to explain the basis for its decision at all. The court simply determined on its own that "[t]he record supports a finding of differences in working conditions sufficient to support a conclusion that the pressmen at the Company enjoy a distinct community of interests." Pet. App. A3. But this Court has long held that courts "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 44. *See also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). And, in all events, the court of appeals did not explain either how its conclusion is reconcilable with prior decisions of the Board holding on similar factual records that pre-press and press room employees in the lithographic printing industry should nevertheless be included in the same bargaining unit. And, of course, the court did not explain why the Board should be allowed to depart without explanation from those prior decisions in this case.

With respect to the opposition brief of the Solicitor General, it is clear that the Solicitor General cannot offer

any proper defense of the Board's decision here. His suggestion (Opp. Br. 9-10) that the Board does not even have a prior lithographic industry bargaining unit practice from which it could have departed is at odds with the Board's decisions here and elsewhere. *See* Pet. App. A13; *Earl Litho Printing Co., Inc.*, 116 N.L.R.B. 1538, 1539 (1956) ("[t]he Board has consistently held that all employees engaged in the lithographic production process form a cohesive unit for collective-bargaining purposes and has established units which included all such employees without regard to the specific skills of the employees or the departmental nature of the unit sought."); *A.B. Hirschfeld Press, Inc.*, 96 N.L.R.B. 1068, 1069 (1951) ("absent unusual circumstances, all employees engaged in the lithographic process form an indivisible entity for the purposes of collective bargaining"). Likewise, his suggestion (Opp. Br. 10-13) that the facts in the record warrant a departure from any "traditional" practice that the Board may have had constitutes an improper effort to substitute "appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines v. United States*, 371 U.S. at 168. *See also NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. at 443-44. And, in all events, the Solicitor General merely relies on the same shopworn factual distinctions that the Regional Director and the court of appeals relied upon—distinctions that appear trivial and that do not begin to explain why Petitioner's employees should be treated differently than the employees of other lithographic industry employers who have in the past come before the Board.

In the final analysis, neither the court of appeals nor the Solicitor General can remedy the error of the Board in this case. It is the Board's discretion that must be exercised and that is subject to judicial review. Only the Board can provide the reasoned explanation that would justify a departure from its prior decisions and policies. But even the Board can do so only by forthrightly explaining why it is abandoning its prior decisions and

policies; reliance on trivial factual distinctions will not suffice. To allow such trivial and/or unexplained distinctions to suffice would mean that, contrary to all principles of modern administrative law, the Board has become the " 'monster which rules with no practical limits on its discretion.' " *Burlington Truck Lines, Inc. v. United States*, 371 U.S. at 167 (citation omitted). *See also* L. Jaffe, *supra*, at 588.

The threat from the Board is not limited to unit determination issues. The Board has departed from prior policy without justifying its departure in numerous contexts. *See, e.g., International Union (UAW) v. NLRB*, 459 F.2d 1329 (Board attempted to abandon its prior policy of applying the 'adverse inference' rule in Board proceedings); *NLRB v. International Union of Operating Eng'rs*, 460 F.2d 589 (Board attempted to reverse its prior position that individual managers would not be liable for back pay judgments). Strong and decisive action is needed from this Court to discourage the kind of "inadequate thinking, failure to face issues, hidden expediencies, or downright dishonesty" that produced the arbitrary and capricious decisions of the Board in this case and elsewhere. L. Jaffe, *supra*, at 588. Indeed, such action is needed to send a signal to administrative agencies throughout our government that administrative power must be exercised carefully and openly if it is properly to be exercised at all.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

Of Counsel:
STEPHEN A. BOKAT
MONA C. ZEIBERG
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Dated: April 29, 1994

GLEN D. NAGER
(Counsel of Record)
COLLEEN COVELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939
Attorneys for the Chamber of Commerce of the United States of America